Supreme Court, U.S.
FILED

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Docket No. _____

THE SUPREME COURT OF THE UNITED STATES

October 1997 Term

ROBERT G. MORRIS,
Petitioner

verses

SANDRA L. MORRIS,
Respondent

On Petition for Writ of Certiorari From the
Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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210 491-0800

QUESTONS PRESENTED FOR REVIEW

ONE

May the state courts of Texas award a portion of gross military retired pay as a division of property in a divorce within their jurisdiction after the passage of the Uniformed Services Former Spouse Protection Act [USFSPA] (10 U.S.C. 1408) ?

TWO

May a divorce decree entered in 1984 purporting to award 50% " of the military retirement benefits and any future increases in benefits, due and payable .....as a result of...military service" be construed by a court as awarding a portion of "gross" military retirement pay after the decision in *MANSELL v. MANSELL*, 490 U.S. 581, 109 S.Ct. 2023 (1989) which interpreted the USFSPA as restricting division of military retired pay to " disposable " ?

THREE

If "gross" military retired pay can be divided by a state court after the passage of the USFSPA, should the clear and unambiguous wording and purpose of the enabling statute, to limit division to "disposable " military retired pay, be presumed to be the intent of a divorce decree in the absence of specific decretal wording to the contrary ?

PARTIES

The caption contains all of the parties to the previous proceedings.

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CITATION OF THE REPORTS OF THE OPINIONS AND ORDERS

None of the opinions and orders in this case were published.

Copies of the orders themselves are contained in the appendix.

STATEMENT OF THE BASIS FOR JURISDICTION OF THE COURT

This case resulted from an a motion to clarify and enforce a divorce decree in the 27th District Court of Texas. The case involved a federal question, to wit: the interpretation of 10 U.S.Code § 1408, a federal statute. The case was unsuccessfully appealed by Petitioner to the Texas Fourth Circuit Court of Appeals and the Texas Supreme Court. This writ is taken from the Texas Supreme Court decision denying Petitioner's request for review

The Supreme Court has jurisdiction of this case under the provisions of 10 U. S. Code § 1257.

STATUTORY PROVISIONS

The following federal statues applies to this matter:

5 U.S. Code § 5532.

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

10 U.S. Code § 1408

(a)(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is

entitled (other than the retire pay of a member retired for disability under chapter 61 of this title [10 USCS §§ 1201 et seq.]) less amounts which-

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [5 USCS §§ 101 et seq.; 38 USCS §§ 101 et seq.];

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

FACTUAL STATEMENT OF THE CASE

Robert G. Morris, Petitioner and Sandra L. Morris, Respondent were divorced in Boerne Texas on May 23, 1984. At that time Robert G. Morris was retired from the United States Air Force. At the time of the divorce, the Uniformed Services Former Spouse Protection Act (10 U.S. Code § 1408, hereafter referred to as USFSPA) became effective on February 1, 1983. That statute granted state courts the right to divide only " disposable" military retired pay. Disposable retired pay was determined by a very specific formula stated in the statute [section 1408(a)(4]. The divorce decree in this case was prepared by Sandra L. Morris's attorney. It stated that she was awarded 50% "of the military retirement benefits and any future increases in benefits, due and payable to ROBERT G. MORRIS....as a result of his military service." On that date, the USFSPA specifically limited this award to 50% of Petitioner's disposable military retired pay. Robert G. Morris began paying Sandra L. Morris 50% of the amount he received from the Air Force as retirement pay.

In 1986 Robert G. Morris began working for the Air Force again as a civilian employee. Because he was a retired regular officer, 5 U.S.C. § 5532 required that he forfeit a portion of his retired pay. This

resulted in Petitioner receiving "disposable" retired pay, as determined by the Defense Accounting and Finance Office by application of the formula contained in the USFSPA. The amount of this new "disposable" retired pay he began receiving was less than the previous amount he received prior to the 5 U.C Code § 5532 deductions.

Petitioner adjusted the amount of Sandra L. Morris's retired pay downward by the same percentage that his was reduced and he began paying her 50% of his "disposable" retired pay, which he was now receiving. He sent her an explanation of why the amount she was receiving was lower, and continued sending her the lower amount based on his "disposable" retired pay. These payments to Respondent were consistent with the provisions of the USFSPA formulas for payment of disposable retired pay. Sandra L. Morris accepted the lower amount for 5 years, then filed a motion for clarification and enforcement for the purpose of requiring Robert G. Morris to pay her based on his gross military retired pay as he had originally done when his gross retired pay and his disposable retired pay were the same amount. At the hearing on the motion the trial judge determined that the retired pay due to Sandra L. Morris should be based on Robert G. Morris's gross retirement pay, not his disposable retired pay as provided for by the federal enabling statute, the USFSPA.

This federal question was first raised at the trial court's hearing of Respondent's motion for clarification and enforcement, specifically in the opening statement of Petitioner's Counsel at page 8 of the record and again in the closing argument at page 66 of the record. The trial judge ignored the limitations of "disposable" retired pay imposed by the federal statute at pages 68-70 of the trial record. The initial decision in this motion was appealed by Petitioner to the Fourth Circuit Court of Appeals of Texas. The federal question regarding the interpretation if 10 U.S. Code § 1408, raised in the appellate brief in the first point of error, pages 2-3. The Court of Appeals ruled against petitioner on the federal question. In the Petition for Review to the Texas Supreme Court, the federal question was again raised in the argument in Petitioner's brief as well as in each of the points of error asserted. The Texas Supreme Court denied the Petition for Review on May 21, 1998. This Petition is taken from that denial of appeal.

ROBERT G. MORRIS appealed the trial court's decision to the Fourth Circuit Court of Appeals arguing, among other noted errors, that the trial court decision was contrary to the specific wording of the USFSPA and the United States Supreme Court's interpretation of the statute. The Court denied the appeal in an opinion dated September 10, 1997. A request for rehearing was denied on November 4, 1997. Petitioner then appealed the case to the Texas Supreme Court and on

May 21, 1998, that Court denied his petition without opinion. Petitioner makes this petition for certiorari based on the denial of the appeal by the Texas Supreme Court.

ARGUMENT

Petitioner contends that the trial court was without jurisdiction to award a portion of his gross military retired pay to Respondent. The United States Supreme Court preempted this area of family law in the case of *McCarty v. McCarty*, 453 U.S. 210 (1981). They concluded that there was an overriding federal interest in the issue of military retired pay and they asserted the supremacy of federal law. As a result of that decision, states were totally without authority to divide military retired pay. This limitation was accepted by the Texas Supreme Court in *Tranhan v. Trahan*, 626 S.W. 2d 485 (Tex. 1981). In 1982 the U. S. Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) to reverse that Supreme Court decision. This statute gave limited authority to state courts to award military retired pay as community property. Congress very specifically stated that only a portion of "disposable" retired pay could be so awarded (section 1408c).

The decree in this case was signed and entered on May 8, 1994 , after the passage of the USFSPA. The United States Supreme Court in interpreting the USFSPA in the case of *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023 (1989) held that Congress by " plain and precise language" intended to limit it's grant of jurisdiction over military retired

pay to disposable pay and to "place limits on state courts designed to protect retirees." (*id* at 594). Therefore, according to that interpretation of legislative intent in 1982, a Texas district court did not have the jurisdiction in 1984 to award a portion of "gross" retired pay in this decree. Regardless of intent of the parties, all that could possibly have been disposed of by the original decree and by the court was disposable retired pay.

Assuming arguendo that the statute allowed parties to agree to go beyond the " plain and precise language" of the statute, which Petitioner maintains could not have been done under the statute, the drafter of the agreement should have used similarly clear and precise language to change the absolute limitations created by the statute. The record in this case establishes that Respondent's attorney drafted the documents and failed to state what if any formula other than that provided by the statute was intended. The wording used was " military retirement benefits ", not "gross" or "total" or any other wording which would suggest other than disposable retired pay was intended. In the absence of specific decretal language, the clear and precise wording of the federal enabling statute should have applied to the case. The default position in the absence of any other indications to the contrary would have to be "disposable" according to Congress and the United States Supreme Court. Petitioner testified that he presumed he would be

giving Respondent 50% of what he received "if as and when received". The record establishes that Petitioner did in fact send Respondent 50% of what he received, which amount changed over the years as the "disposable" pay he received from the Air Force changed. Petitioner complied with the wording of the decree as well as the intent of the statute.

The United States Supreme Court in *Mansell v. Mansell* (id) held in very plain wording that disposable military retired pay means disposable, not gross. The Fourth Circuit Court of Appeals, in deciding our case, correctly cited this holding of *Mansell* on page 3 of their Opinion (appendix B-4). However that Court went on to incorrectly determine that the Supreme Court left the application of *Mansell* up to the state courts. That conclusion would be inconsistent with the explicit statements of the law in *Mansell*,. Texas Courts from the Supreme Court down have misinterpreted and misapplied the law of *Mansell*, relying on footnote 5 on page 586 of *Mansell* (supra) as permitting the states to determine the USFSPA's applicability.

We submit that is not what footnote 5 says or suggests. That footnote very clearly says that it is up to the states to determine if their individual *res judicata* laws allow the reopening of pre-*McCarty* cases in order to apply the new post *McCarty*

disposable retirement rules. In that footnote, the U.S. Supreme Court stated that *res judicata* was the state's business, the federal issue of what disposable military retired pay, however was properly before them. The case of *Berry v. Berry*, 786 S.W. 2d 672 (Tex. 1990) cited by the Court of Appeals (appendix B-4) was very much on point on this issue. The *Berry* case was a divorce that was granted in 1980, pre *McCarty* and pre USFSPA. The Texas Supreme Court in that case correctly cited *Mansell* as leaving the retroactive application of USFSPA regarding divorces granted before 1981 to the states. Our case is clearly distinguishable because it does not involve a retroactive application of USFSPA. However the Texas courts insist on reading more into *Mansell* than was intended. In *Jones v. Jones*, (Tex. App.- San Antonio1995, *writ denied*) the same State Court of Appeals that denied Petitioner's case held that the limitations of the USFSPA and Mansell did not apply in a divorce granted in 1988, because of *res judicata.*

Mansell does not leave the decision of when or whether to apply the limitations of the 1982 USFSPA up to the states courts of Texas. It clearly requires those 1982 limitations to this divorce which occurred in 1984.

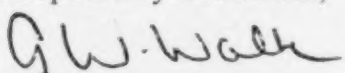
CONCLUSION

The USFSPA limited the jurisdiction of state courts by allowing them to only divide "disposable" military retired pay. The trial court in this case had no jurisdiction to divide Petitioner's gross pay as it did. Mansell very clearly addressed this issue and this Court stated that " disposable means disposable", yet the court system of Texas, as late as 1984 in our case and 1988 in the Jones case, is still allowing division of gross retired pay in contradiction of the precise and clear wording of the enabling statute. After McCarty the states had no authority over military retired pay. The only authority they have been given is over disposable retired pay, it is submitted that there is no validity to any theory whereby Texas state courts can find authority over gross military retired pay.

If in fact a division of gross pay is authorized, precise decretal language must be required by the drafter of a decree if the intend jurisdiction limitations of disposable pay set by the statute were intended to be circumvented. Without that wording, the limitations of the federal enabling statute must apply, otherwise the presumption would be gross rather than disposable.

In either case, the award of retired pay should have been limited to disposable pay as defined in the statute. The evidence of record indicates that Petitioner intended to pay Respondent in accordance with what the statute defines as disposable pay, i.e. that total amount which he received from the Air Force. Petitioner's actions indicate that he did comply with the statute. The judgment of the trial court in this case must be reversed in that it misapplies the federal enabling statute in this area of family law which the United States Supreme Court has determined to preempt.

Respectfully Submitted,



Anthony W. Walluk.
Counsel for Petitioner
Robert G. Morris
August 14, 1998

CERTIFICATE OF SERVICE

I certify that I mailed two copies of this Petition to Mr. Kevin Shay, Counsel for Respondent at 14400 Northbrook Drive, Suite 230 San Antonio, Texas 78232 by regular mail on August 14, 1998 at the same time that I submitted the original and 39 copies of the Petition to the Court.

Anthony W. Walluk
Counsel for Petitioner
Robert G. Morris

APPENDIX CONTENTS

A. Order of Motion.....A1

B. Opinion of the Fourth Circuit Court of Appeals

(Unpublished).....B1

C. Order of the Fourth Circuit Court of Appeals

denying a rehearing.....C1

D. Denial of Appeal from Texas Supreme Court.....D

No. 4621

IN THE MATTER OF IN THE DISTRICT COURT

THE MARRIAGE OF KENDALL COUNTY,

SANDRA L. MORRIS,

AND ROBERT G. MORRIS TEXAS

ORDER

The hearing on Movant's Motion to Enforce was heard on February 7, 1996. Movant, Sandra L. Morris, appeared in person and by attorney, as did Robert G. Morris, respondent.

The Court examined the pleadings and heard the evidence and arguments of counsel. All parties whose rights, privileges, duties, or powers may be affected by the motion received notice or appeared at the hearing.

The Court finds that respondent has violated the terms of the Property Settlement and Divorce Agreement dated May 8, 1984 that was approved and incorporated by this Court in its Decree of Divorce entered in the above-entitled matter on May 23, 1984 concerning the payment of retirement benefits between the parties. A copy of the Property Settlement and Divorce Agreement is attached to the motion to enforce as Exhibit A. Respondent has failed to abide by the property

settlement by refusing and continuing to refuse to pay movant her full share of benefits that became due and payable each month commencing with July of 1993 to date. Accordingly, it is ORDERED that Movant have judgment against Respondent in the total amount of $14,820.18.

It is FURTHER ORDERED that Movant have judgment against Respondent in the additional amount of $3,000.00 for reasonable attorney fees incurred on to motion to enforce.

It is FURTHER ORDERED that Movant shall take all reasonable action to qualify her to receive an involuntary allotment of Respondent's military retirement benefits under the Uniform Services Former Spouse Protection Act, 10 U.S.C. Section 1408 et seq.

It is FURTHER ORDERED that Respondent pay all unpaid amounts of Movant's portion of military retirement benefits received by Respondent as trustee pursuant to the terms of the Property Settlement and Divorce Agreement to be calculated as 50% of the gross military retirement benefits less previous payments to or for the benefit of Movant made by or on behalf of Respondent by the Air Force or otherwise.

It is FURTHER ORDERED that Respondent deliver to Movant copies of all Air Force Retiree Account Statements, or

their equivalent, and tax information returns (e.g. IRS forms W-2, W-2P, 1099R, etc.) that Respondent receives from the Air Force or other government entity with respect to Respondent's military retirement that is subject to the Property Settlement and Divorce Agreement within 10 days of his receipt of such documents.

It is FURTHER ORDERED that Respondent issue a tax information return, IRS Form 1099 or equivalent, to Movant each year, beginning with 1995, showing the total amounts paid to Movant by Respondent, less any amounts reported to Movant directly by the Air Force or other governmental entity, with respect to Respondent's military retirement that is subject to the Property Settlement and Divorce Agreement, following all the Internal Revenue Service rules and regulations regarding such tax information returns.

And it is FURTHER ORDERED that all relief not expressly granted in this Order is denied.

SIGNED this 11th day of April, 1996.

signed

JUDGE PRESIDING

Approved as to form:

KEVIN P. SHAY

____signed_____
Kevin P. Shay
Attorney for Sandra Morris
3238 N.W. Loop 410
San Antonio, Texas 78213
Telephone 210-308-8388
Facsimile 210-340-5200
State Bar ID No. 18163500

ANTHONY W. WALLUK

_____signed_____
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State Bar ID No. 20796100

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

* * *
* * *

OPINION
No. 04-96-00629-CV

Robert G. **MORRIS,**
Appellant

v.

Sandra L. **MORRIS,**
Appellee

From the 216th Judicial District Court of Kendall County
Trial Court No. 4621
Honorable Stephen B. Ables, Judge Presiding

Opinion by: Tom Rickhoff, Justice

Sitting: Tom Rickhoff, Justice
Catherine Stone, Justice
Sarah B. Duncan, Justice (concurring in the judgment)

Delivered and Filed: September 10, 1997

AFFIRMED

In this case about community property rights in military retirement pay, we credit the trial court's construction of the

ambiguities in the decree and find it cannot be collaterally attached.

Appellant Robert G. Morris and appellee Sandra L. Morris were married in 1958 and divorced in 1984. The property settlement agreement incorporated in the divorce decree awarded 50 percent "of the military retirement benefits and any future increases in benefits" to Sandra Morris. In 1986, Robert Morris took a civilian job at Kelly Air Force Base, which reduced his retirement benefits; Sandra Morris's share was reduced accordingly. He also remarried, and the Air Force began deducting survivor benefits plan increments. He consulted an Air Force attorney and in a 1990 letter told Sandra Morris that he had been overpaying her because he had been sending her a percentage of his gross pay, not net pay as called for in federal law. He adjusted his payment accordingly. Five years later, Sandra Morris filed a Motion to Enforce claiming she had been underpaid; she sought an adjustment and attorney's fees. Robert Morris filed a cross-motion claiming Sandra Morris's claim was preempted by federal statute and that Sandra Morris's petition was barred by the statute of limitations; he also sought attorney's fees. After a bench trial, the trial court ordered him to pay her 50 percent of his gross

military retirement pay as well as attorney's fees and past arrearages. In its Findings of Fact and Conclusions of Law, the court found that the parties intended the 50 percent figure in the 1984 divorce decree and property settlement to be applied to gross retirement pay.

In two points of error Robert Morris complains the trial court erred because the result in this case is preempted by federal law and because the trial court erred in not construing ambiguities in the original settlement agreement against the drafter. We affirm.

PREEMPTION BY FEDERAL LAW

Robert Morris contends in his point of error that the trial court was without power to enter the order it entered, because it conflicted both wit an act of Congress and with a decision of the U.S. Supreme Court. We do not agree.

This attack on the divorce decree in response to Sandra Morris's motion to enforce constitutes a collateral attack on a final and unappealable judgment and so invokes the issue of res judicata. *Jones v. Jones*, 900 S.W.2d 786, 787 (Tex. App.-San Antonio 1995, writ denied).

Federal preemption of the right of community property jurisdictions to apportion military retirement pay defines the

law in this area. The Supreme Court first held that the Supremacy Clause and federal statues barred states from treating military retirement pay as community property. *McCarty v. McCarty*, 453 U.S. 210 (1981). In response, Congress passed the United Services Former Spouse' Protection Act, 10 U.S.C. § 1408 (1988) which granted a limited in that states were granted the authority to apportion net retirement pay, not gross retirement pay as was the case before *McCarty* was decided. 10 U.S.C. § 1408 (a)(4)(B); *Mansell v. Mansell*, 490 U.S. 581, 589-590 (1989).

In order for Robert Morris's attack to succeed, he must show the decree which incorporates the settlement to be void, not merely mistaken; in other words, he must show that the court had no jurisdiction over a party or his property, no jurisdiction of the subject mater, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973).

This is not the case before us today. Both at the time the original decree in this case was approved and at the time of the bench trial, USFSPA granted Texas courts jurisdiction over military retirement pay. Therefore the court had jurisdiction of

the subject matter; the judgment is therefore not void, and any collateral attack on this order must fail. *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Jones*, 900 S.W.2d at 788.

Robert Morris complains that the Supreme Court's decision in *Mansell* prempts this result. However, the *Mansell* decision specifically left to the states the question of whether their interpretation of res judicata permitted application of *Mansell* to previously entered divorce decrees. *Mansell*, 490 U.S. at 586 n.5.In turn, our supreme court has held that Texas law does not permit re-opening previously entered decrees. *Berry*, 786 S.W.2d at 673.

Robert's first point of error is overruled.

In his second point of error, Robert Morris argues the trial court erred in not construing the ambiguities in the property settlement agreement against the drafter of the document, Sandra Morris. We disagree.

Robert Morris's argument is that the finder of fact erred in its decision. We will construe this as an attack on the trial court's conclusion of law that Sandra Morris was entitled to 50 percent of Robert Morris's gross retirement pay. We will therefore uphold the trial court's finding if it can be sustained on any legal theory supported by the evidence. *Kotis v.*

Nowlin Jewelry Inc., 844 S.W.2d 920, 922 (Tex. App.-Houston [14th Dist.] 1992, no writ).

Property settlement agreements incorporated into a divorce decree are construed in the same way as a contract. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Our record reflects the trial court announced he did consider this rule of construction in his decision but found that the agreement of the parties controlled. We therefore look to see if there is support in the record for this conclusion.

Acts of the parties done in the course of performance, which indicate the construction that the parties themselves put on the contract, may properly be considered by the court in interpreting an agreement that is doubtful or ambiguous. *Lone Star Gas Co. v. X-Ray Gas Co.*, 139 Tex. 546, 164 S.W.2d 504, 508 (1942); *Gillman v. Phillips Petroleum Co.*, 601 S.W.2d 513, 516 (Tex. App.-Armadillo 1980, no writ); 14 TEX.JUR. 3d *Contracts* §205 (1981).

Here the record reflects that Robert Morris paid Sandra Morris half his gross retirement pay for almost two years after the agreement was signed. The trial court in our case could have taken this as some evidence that the parties intended the agreement to cover gross pay and not net pay.

Morris's second point of error is overruled.

The judgment of the trial court is affirmed.

Tom Rickhoff, Justice

DO NOT PUBLISH

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

* * *

* * *

JUDGMENT

No. 04-96-00629-CV

Robert G. **MORRIS,**

Appellant

v.

Sandra L. **MORRIS,**

Appellee

From the 216th Judicial District Court of Kendall County

Trial Court No. 4621

Honorable Stephen B. Ables, Judge Presiding

BEFORE JUSTICE RICKHOFF, JUSTICE STONE AND JUSTICE DUNCAN

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee Sandra L. Morris recover her costs of this appeal

from appellant Robert G. Morris as principal and from Anthony W. Walluk and Peter Held as sureties on appellant's cost bond.

SIGNED September 10, 1997.

signed
TOM RICKHOFF
JUSTICE

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

November 4, 1997

Anthony W. Walluk
110 East Nueva
San Antonio, TX 78204

Kevin P. Shay
3238 N.W. Loop 410
San Antonio, TX 78213-2811

RE: Court of Appeals Number: 04-96-00629-CV
Trial Court Case Number: 4621

Style: Robert G. Morris
v.
Sandra L. Morris

Dear Counsel:

After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,

HERB SCHAEFER, CLERK

signed
JOYCE WIATREK, DEPUTY
CLERK

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 21, 1998

Mr. Anthony W. Walluk
110 E. Nueva
San Antonio, TX 78204

Mr. Kevin P. Shay
14400 Northbrook Drive, Suite 230
San Antonio, TX 78232

RE: Case Number 97-1186
Court of Appeals Number: 04-96-00629-CV
Trial Court Number: 4621

Style: ROBERT G. MORRIS
v.
SANDRA L. MORRIS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by: signed
Michael H. Kopp,
Deputy

cc: Mr. Herb Schaefer, Clerk
Ms. Shirley R. Stehling

Supreme Court, U.S.
FILED
SEP 16 1998
CLERK

No. 98-291

In The

Supreme Court of the United States

October Term, 1997

ROBERT G. MORRIS,

Petitioner,

v.

SANDRA L. MORRIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES STATUTES

10 U.S. Code, Section 1408 et seq 1, 2, 3, 4

STATEMENT OF THE CASE

Respondent initiated this case at the trial level to enforce the Property Settlement and Divorce Agreement entered into by the parties at the time of their divorce on May 23, 1984. The Property Settlement and Divorce Agreement was incorporated into the Divorce Decree entered as a judgement by the 216th Judicial District Court of Kendall County, Texas. Based upon evidence presented at trial, the trial court, interpreting the meaning of certain language in the Property Settlement and Divorce Agreement, found that the parties had agreed to split Petitioner's "gross military retirement benefits" 50% to each. The trial court concluded as a matter of law that the Divorce Decree was a final judgement.

Petitioner has argued at trial and on appeal that federal law preempts the trial court's interpretation of the Divorce Decree (Property Settlement and Divorce Agreement). The Texas courts have ruled against this argument based upon *res judicata*, to wit: Petitioner's argument for federal preemption is a collateral attack of a final judgement and therefore barred.

PRECEIVED MISSTATEMENTS OF FACTS AND LAW

Petitioner states in his STATEMENT OF THE BASIS FOR JURISDICTION OF THE COURT that "The case involved a federal question, to wit: the interpretation of 10 U.S. Code Section 1408, a federal statute." In fact, the case at the trial level involved interpretation of language of the prior final Divorce Decree. The Uniformed Services Former Spouses' Protection Act, 10 U.S. Code Section

1408 et seq. ("USFSPA") was not applied to this case because to do so would have in effect been a retroactive application of such federal statute to a final judgement.

Petitioner states that Respondent accepted the reduced retirement benefits from Petitioner after he took a civil service job in 1986. Beginning immediately after the Divorce, Petitioner sent Respondent monthly checks for retired pay based upon the top line or gross retirement benefits shown on the retired pay statements Petitioner received from the Air Force until 1986 (Tr. at 52). Until Respondent received copies of Petitioner's retired pay statements he received from the Air Force for the years 1991 and 1992, Respondent had not received any information from Petitioner from which she could independently calculate the amounts due to her (Tr. at 14). Respondent testified that she had expressed opposition to Petitioner's reduction of the amount paid to her and had requested information about the retirement benefits after the reduction (Tr. at 18-19).

Petitioner states that the trial court ignored the limitations of "disposable" retired pay imposed by the federal statute. To the contrary, the trial court was only interpreting the prior final judgement, when, based upon evidence presented at the trial, he found that the parties had agreed to the 50% split. The trial court had no authority to apply the USFSPA retroactively to the final judgement of the 1984 Divorce Decree.

REASONS FOR DENYING THE WRIT

That part of the trial court's ruling that Petitioner is appealing is an interpretation of the meaning of the Petitioner's and Respondent's Divorce Decree entered on May 23, 1984. Petitioner's argument is a collateral attack on a final judgement. The Petitioner did not appeal the Divorce Decree and it is final. The trial court, based upon evidence presented at trial, interpreted the meaning of the Divorce Decree. Evidence was presented at the hearing to prove the understanding and agreement of the parties with respect to the meaning of the language in question. The trial court found, based upon the evidence, that it was the agreement of the parties that Petitioner was to pay Respondent 50% of the "gross" retirement benefits. (Findings of Fact No. 8, Findings of Fact and Conclusions of Law at 2).

Petitioner argues that *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), should be applied retroactively to collaterally attack a valid final Texas judgement. In the *Mansell* decision, the U.S. Supreme Court specifically left the determination of retroactive application of the USFSPA the state courts. *Mansell*, 490 U.S. at 586 footnote 5. The federal question in *Mansell* was properly before the U.S. Supreme Court because of a prior California Court's ruling "that it was appropriate, under California law, to reopen the settlement and reach the federal question." The Texas Supreme Court in *Berry v. Berry*, 786 S.W. 2d 672 (Tex. 1990) refused to apply the ruling of the U.S. Supreme Court in *Mansell* to retroactively invalidate a final judgement in Texas.

As the Texas Supreme Court so wisely determined in *Berry*, to allow retroactive application of the U.S. Supreme Court's *Mansell* decision to a final Texas divorce judgements would work an unjust hardship upon the non-military ex-spouse. Otherwise the military ex-spouse could unilaterally decide to change the amount the non-military ex-spouse receives by accepting civil service employment. The military ex-spouse receives the full pay from the civil service employment, but both spouses receive less from the military retirement pursuant to the USFSPA, and because the divorce judgement is final the non-military spouse would be left with no legal recourse. Essentially, those are the facts in this case. This would be an unjust result.

CONCLUSION

Petitioner's appeal is a collateral attack upon a valid final Texas judgement and does not merit further review by this Court. For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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